United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-2089
76-2094

To be argued by
Ralph McMurry

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIAN FIELDING,

Petitioner-Appellant-Appellee,

-against-

WARDEN, Green Haven Prison, et al.,

Respondents-Appellees-Appellants.

76-2089
76-2094

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A/S

BRIEF FOR RESPONDENTS-APPELLEES-APPELLANTS

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BRIEF FOR RESPONDENTS-
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Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (Metzner, J.) dated July 16, 1976, denying in part and granting in part petitioner's application for a writ of habeas corpus.

The petition for habeas corpus was filed prior to the execution of petitioner's state sentence. Accordingly the Warden of Green Haven was not, at least initially, a proper party.* In any event, both the Attorney General and the Westchester County District Attorney opposed the writ.

* The new federal habeas rules became effective August 1, 1976, after this writ was filed. 44 USLW 4551. Section 2b requires that in cases where a writ is filed prior to execution of sentence, the Attorney General and the officer then having custody of the prisoner should both be named as respondents.

Questions Presented

1. Whether the severity of petitioner's sentence is a question cognizable under federal habeas review, and whether the limited relief afforded petitioner by the District Court was beyond the District Court's habeas jurisdiction?

2. Whether petitioner has demonstrated that he has exhausted state remedies?

Facts

The facts of this particular case are peculiarly within the knowledge of the Westchester County District Attorney, and the court is respectfully referred to the District Attorney's brief for a full recitation of the facts.* Briefly, however, this case involves a state prisoner whose essential claim is that his sentence was too harsh. Petitioner received a seven year sentence in Westchester County Court on conviction, after bench trial, for several counts of sodomy in 1974. Petitioner had been the coach of a football team for young boys and his convictions arose out of his relationship with boys on the team.

* The Attorney General also joins in the arguments of the Westchester District Attorney.

Petitioner's judgment of conviction was affirmed by the state appellate courts. Petitioner also claims he unsuccessfully applied in the Appellate Division for a reduction of sentence.

Petitioner, with aid of counsel, then filed the instant petition for a writ of habeas corpus. Petitioner claimed his sentence and the sentencing process violated the Sixth, Eighth and Fourteenth Amendments.

Opinion Below

Judge Metzner denied petitioner habeas relief in all respects save one. Judge Metzner remanded to the state court sentencing judge for a determination by him as to whether the sentence he imposed on petitioner was influenced by the fact that petitioner stood trial rather than pleaded guilty.*

* On the remand the state judge found he had not been so influenced. Appendix 156a.

POINT I

THE SEVERITY OF A STATE COURT SENTENCE IS NOT SUBJECT TO FEDERAL HABEAS REVIEW. THE LIMITED RELIEF AFFORDED PETITIONER WAS BEYOND THE DISTRICT COURT'S HABEAS JURISDICTION

Petitioner's claim boils down to the simple proposition that his sentence was much too severe under all the circumstances. He urges that prison for him is an improper sentence.

The severity of a sentence is not cognizable in federal habeas review, so long as the sentence is within the limits defined by state law. This is settled law. Townsend v. Burke, 334 U.S. 736, 741 (1948); United States ex rel. Marcial v. Fay, 267 F. 2d 507 (2d Cir. 1959); United States ex rel. Davidson v. LaVallee, 301 F. 2d 902 (1962), cert. den. 371 U.S. 24; Long v. Pate, 418 F. 2d 1028 (7th Cir. 1969), cert. den. 398 U.S. 952; Wright v. Maryland Penitentiary, 429 F. 2d 1101 (4th Cir. 1970); Stevens v. Warden, 382 F. 2d 429 (4th Cir. 1967), cert. den. 390 U.S. 1031 (4th Cir. 1967); Dillon v. Downes, 401 F. Supp. 1240 (W.D. Va. 1975); United States ex rel. Josephs v. LaVallee, 290 F. Supp. 90 (S.D.N.Y. 1968), reversed other grounds

415 F. 2d 150 (2d Cir. 1969); Donaldson v. Wyrick, 393 F. Supp. 1041, 1045 (W.D. Mo. 1974); Meller v. Swenson, 335 F. Supp. 1261, 1266 (W.D. Mo. 1969); United States ex rel. Burgess v. Rundle, 308 F. Supp. 1338 (E.D. Pa. 1970). This is so notwithstanding alleged prejudice by the trial judge. Meller v. Swenson, supra.

The fact is petitioner was sentenced by the state trial court. That sentence is not infirm because petitioner feels it was brutally harsh; in this connection Judge Metzner quite properly declined to sepculate as to the alleged impact of the State's prisons on petitioner. The trial court was not obliged to reach the result favored by petitioner. That court was not obliged to follow the recommendations of petitioner's experts. Nothing in petitioner's papers alters the fact that he would have the federal courts substitute their judgment for that of the state trial court, although ostensibly petitioner seeks only a remand for "resentencing".

This is not a case where the trial court relied on "material false assumptions" in imposing a sentence. United States v. Malcolm, 432 F. 2d 809, 816 (2d Cir. 1970).

This is a case where the trial court did not choose to rely on alleged facts submitted by petitioner. That petitioner chooses to see this as ignoring facts relevant to sentencing does not change this reality.

A state trial court (as well as a federal trial court) has wide discretion in the sources and type of information it uses in sentencing. Williams v. New York, 337 U.S. 241, 246 (1948). The gravamen of petitioner's writ is that the discretion was exercised in a manner unsatisfactory to petitioner. However, this Court has no power to compel a state court to exercise its discretion in a particular way. Mintz v. Bedrosian, 518 F. 2d 396 (2d Cir. 1975).

Similarly, a state trial court (as well as a federal trial court) may choose among several penological justificiations in sentencing a defendant. Rehabilitation is only one goal of penal sanctions; deterrence and incapacitation are among numerous others. That the state trial court chooses one approach over another or combines several approaches in a given case does not raise a federal constitutional issue.

If the District Court erred at all in this case, it erred mightily on the side of caution in remanding to the state trial court for it to make explicit its motives in sentencing petitioner. Such relief was completely unwarranted under our system of federal habeas review and was beyond the habeas jurisdiction of the District Court. The District Court itself conceded that "habeas corpus review is generally available only after the incarceration of the petitioner and the beginning of his service of his sentence" (36a). However the court found petitioner pre-sentence confinement to a mental hospital "sufficient detention" to provide habeas jurisdiction (36a). Assuming arguendo that there was sufficient custody to give habeas jurisdiction, the relief afforded represents a clear invasion of the legitimate and proper discretionary functions of the state judiciary. The district court in effect assumed a supervisory role over the state judiciary's handling of the Fielding case, and in so doing exceeded its authority and ignored basic principles of comity. See Younger v. Harris, 401 U.S. 37 (1971); O'Shea v. Littleton, 414 U.S. 488 (1974); Samuels v. Mackell, 401 U.S. 66 (1971); Stefanelli v. Minard, 342 U.S. 117, 120-123 (1951).

In any event, any error or defect in the proceedings against Fielding has now been cured by the remand proceeding. Petitioner complains that the remand went to the same state trial judge who sentenced petitioner originally. Obviously if anyone can speak as to the state trial judge's thoughts that accompanied his sentencing, it is that same state trial judge. This is not by itself improper.

Petitioner's request for "resentencing" by a new judge is plainly and simply an attempt to have another shot at a more lenient sentence under a new state judge. Federal habeas review was not meant to work such a result.

Petitioner pays lip-service to the proposition that a federal court may not review the severity of a state sentence (Br. 34), and disguises his claims as a combination of a purported Sixth Amendment right to trial and an Eighth Amendment right to be free of cruel and unusual punishment. Petitioner's labels, however, do not change the true substance of his claim, namely that the sentence was too harsh for some one in petitioner's circumstances. This is simply insufficient to raise a constitutional issue.

In any event, the constitutional claims are without merit. Petitioner does not allege that a seven year sentence for sodomy convictions is unconstitutionally harsh for everyone;* he alleges only that it is too harsh for him. Such an argument inevitably brings the federal courts into the process of reviewing petitioner's individual circumstances to determine what they would consider an appropriate sentence for petitioner; this is the very function which the federal courts should eschew on habeas review.

As to the Sixth Amendment claim, clearly petitioner was not deprived of any right to a trial. As Judge Metzner noted, the state trial court did not make up his mind on sentence in advance of receiving all relevant data, but merely indicated his "present" views in a plea bargaining context. This Court has found such a practice not improper in United States ex rel. Selikoff v. Commissioner, 524 F. 2d 650 (2d Cir. 1975), a case conveniently ignored by petitioner in his brief.

* Such an argument would of course be meritless; state legislatures are vested with broad powers and discretion in defining crimes and the range of sentences therefor. See Pennsylvania v. Ashe, 302 U.S. 51 (1937). People v. Broadie, 37 N Y 2d 100, cert. den. 96 S. Ct. 372 (1975).

As noted in Selikoff at 653, under New York law a trial court may not reach a final decision on sentence until receipt of a pre-sentence report. There is no indication that is not the case here; indeed, as Judge Metzner indicated there is every indication that the state trial judge did read the pre-sentence report. If there ever was any doubt, that doubt has been eliminated from a reading of the remand proceeding in which the state trial judge stated that he "read and reread" "every single letter and every single word" in the pre-sentence report (163a, 166a).

A reading of the remand proceeding should remove any doubt that the sentence of petitioner was improperly imposed. The sentence was a carefully considered one. It was a fair sentence. Petitioner's argument for federal habeas review in the final analysis rests on the untenable and unstated premise that the state trial judge was a monster, along with the state appellate judges who affirmed the result. There is simply no basis for such a conclusion.

POINT II

PETITIONER HAS FAILED TO DEMONSTRATE EXHAUSTION OF STATE REMEDIES

Petitioner has failed to demonstrate that he has exhausted state remedies.* In the District Court, the petition alleged that "the exhibits annexed hereto were filed with the sentencing court, and the constitutionality of his sentence and the bias of the sentencing judge were briefed to the New York Court of Appeals". It was further alleged that an application had been made in the Appellate Division for a "reduction of sentence". See Appendix 27a. It was not stated in the petition what materials or arguments were made in this application for "reduction of sentence".

* Rule 5 of the new federal habeas rules, 44 USLW 4551, effective August 1, 1976 after this writ was filed, states that the answer to the petition shall state whether state remedies have been exhausted. However these rules seem to concern pro se petitions. Where, as here, petitioner is represented by able counsel, counsel can be expected initially to demonstrate exhaustion. At the least counsel can be expected to address exhaustion where, as here, the State raised the issue. This Court has previously put the burden of showing exhaustion on counsel for petitioner. United States ex rel. Rogers v. LaVallee, 463 F. 2d 185, 187 (2d Cir.1972); United States ex rel. Cuomo v. Fay, 257 F. 2d 438 (2d Cir. 1958), cert. den. 358 U.S. 935; see also Baldwin v. Lewes, 442 F. 2d 29 (7th Cir. 1971); Thompson v. Overlade, 216 F. 2d 492 (8th Cir. 1954).

In opposition to the writ, the District Attorney respondents argued, inter alia, that petitioner had not exhausted available state remedies. Resp. Memorandum of Law in District Court, p. 7. Respondents argued that in his federal petition petitioner alleged facts outside the state court record and thereby raised issues and facts never considered by the state courts. According to respondents, it was urged that such extra-record facts could only be considered in the state courts by way of an Article 440 proceeding (commonly referred to as a "coram nobis" proceeding). Respondents contended that petitioner had never initiated such a proceeding.

In the face of this conflict on the exhaustion problem, petitioner filed a "Reply Memorandum" which claimed all the facts were before the state courts, and which in conclusory fashion alleged that the same issues had been before the state courts.

Judge Metzner apparently assumed that petitioner had exhausted his state remedies, since he failed to mention it in his opinion. In light of the conflict on the exhaustion, the District Court should have passed on the question.

Exhaustion requires presentation of both identical legal theories and identical facts to the state courts. Under the exhaustion doctrine the state courts must be given a "fair opportunity" to consider petitioner's claims. Picard v. Connor, 404 U.S. 270, 276 (1971). The state court claim must be the same as the claim in federal court. Picard, supra, at 276. In Picard, the petitioner had claimed in the state courts that based on certain facts he had been denied his constitutional rights under the Fifth Amendment. He then presented the same facts to the federal courts which sua sponte considered them in light of the equal protection clause. The Supreme Court reversed on exhaustion grounds, finding that the same claim had not been presented to both courts.

This Court has interpreted "fair opportunity" to require a precise presentation to the state courts of the same legal claims pressed in the federal habeas court. Claims which are only approximately the same, or general assertions of denial of constitutional rights or due process rights are insufficient. United States ex rel. Gibbs v. Zelker, 496 F. 2d 991, 993 (2d Cir. 1973)(general assertion that seizure of knife violated constitutional rights insufficient for exhaustion purposes

constitutional rights insufficient for exhaustion purposes to raise claim of Fifth Amendment violation); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1125 (2d Cir.), cert. den. 409 U.S. 1045 (1972)(general due process argument in state court not sufficiently precise for exhaustion purposes where claim in federal habeas corpus couched specifically in terms of Fifth Amendment); Mayer v. Moeykens, 494 F. 2d 855 (2d Cir.), cert. den. 417 U.S. 926 (claim that arrest warrant "insufficient" not identical to claim that no probable cause existed for arrest).

In addition to requiring presentation to the state courts of legal theories, identical to those urged in federal court, exhaustion requires the presentation to the state courts of facts identical to those alleged in federal court. United States ex rel. Cleveland v. Casscles, 479 F. 2d 15, 19-20 (2d Cir. 1973); United States ex rel. Figueroa v. McMann, 411 F. 2d 915 (2d Cir. 1969); United States ex rel. Boodie v. Herold, 349 F. 2d 372 (2d Cir. 1972); United States ex rel. Kessler v. Fay, 232 F. Supp. 139, 142 (S.D.N.Y. 1964).

In light of the above authorities, petitioner has failed to demonstrate that he has properly exhausted state remedies. Petitioner's exhaustion claim is a conclusory one. He has failed to demonstrate that the identical legal claims and identical facts he raises now were actually presented to the state courts.

Given the conflict on the question of exhaustion and given petitioner's own inadequate demonstration of exhaustion, it is submitted that the District Court erred in not passing on the question. Where exhaustion is not clear from the record the cause should be remanded for a determination of that issue. United States ex rel. Irons v. Montanye, 520 F. 2d 646 (2d Cir. 1975).

CONCLUSION

PETITIONER MUST DEMONSTRATE EXHAUSTION OF STATE REMEDIES. IN THE ALTERNATIVE THE JUDGMENT BELOW MUST BE REVERSED INSOFAR AS IT GRANTED PETITIONER HABEAS RELIEF, AND OTHERWISE MUST BE AFFIRMED.

Dated: New York, New York
November 8, 1976

Respectfully submitted,

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STATE OF NEW YORK)
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MARY KO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondents-Appellees-Appellants herein. On the 8th day of November , 1976 , she served the annexed upon the following named person :

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Attorneys in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the addresses within the State designated by them for that purpose.

Mary Ko

Sworn to before me this
8th day of November , 1976

Ralph M. Mary

Assistant Attorney General
of the State of New York